

On January 23, 1991 appellant, then a 39-year-old secretary, filed an occupational disease claim alleging that she developed pain in her hand and arm typing in the performance of duty. The Office accepted her claim for left hand sprain. On February 5, 1993 appellant underwent surgery for left de Quervain's syndrome. On July 26, 1993 the Office accepted the additional condition of right carpal tunnel syndrome. On April 14, 1994 it expanded appellant's accepted

conditions to include left elbow extensor tendinitis. Appellant underwent a right carpal tunnel release on June 25, 1999.

The Office terminated appellant's compensation and medical benefits by decision dated April 27, 2000. Appellant appealed this decision to the Board and in an order dated January 31, 2001,¹ the Board granted a motion by the Solicitor of Labor to remand the case to consider all the medical evidence submitted to the Office prior to the April 27, 2000 decision.

Following the Board's Order, appellant's attending physician, Dr. James E. Lowe, a Board-certified plastic surgeon, diagnosed residual bilateral carpal tunnel syndrome and recommended bilateral surgical releases. The district medical adviser agreed and the Office authorized additional surgery. On April 17, 2001 the Office entered appellant on the periodic rolls. Dr. Lowe performed a repeat right carpal tunnel release on April 11, 2001 as well as a decompression of the ulnar nerve and tenosynovectomy of the flexor tendons. He performed similar surgeries on the left on May 25, 2001.

On April 15, 2002 Dr. Lowe requested additional surgery in the form of bilateral trigger digit release on all fingers of both hands. The district medical adviser disagreed with this request on April 26, 2002.

The Office referred appellant for a second opinion evaluation with Dr. Robert M. Moore, a Board-certified orthopedic surgeon. In a report dated October 15, 2002, Dr. Moore found no evidence of trigger fingers and disagreed that if present this condition would be causally related to appellant's accepted employment injuries. He did not recommend surgery for trigger fingers.

Appellant's November 14, 2002 nerve conduction velocity studies were normal.

Due to a conflict of medical opinion evidence, the Office referred appellant to Dr. Robert Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination. In his August 17, 2005 report, Dr. Elkins opined that appellant's trigger fingers if present were not causally related to her accepted employment injuries. He stated that no surgery was necessary. Dr. Elkins stated that he found no evidence of synovitis, extensor tendinitis, carpal tunnel syndrome or trigger fingers. He also opined that appellant could return to nonrepetitive work. Dr. Elkins did not recommend any further treatment. In response to the Office's request for a supplemental report, he opined that appellant's work-related condition had resolved as of August 17, 2005, but noted that she continued to have alleged subjective symptoms.

Dr. Lowe submitted office notes in which he continued to diagnose numbness and weakness in the median nerve distribution, including bilateral carpal and cubital tunnel syndromes, trigger fingers of the left hand as well as positive Tinel's sign and bilateral abductor pollicis weakness.

The Office requested additional information from Dr. Lowe regarding appellant's current conditions and the relationship to her accepted employment injury on May 23, 2007. Dr. Lowe submitted a note dated May 24, 2007 and found a positive Tinel's sign in the carpal tunnel of

¹ Docket No. 00-2309 (issued January 31, 2001).

both wrists as well as multiple trigger digits in the left hand and bilateral abductor pollicis weakness. He also submitted a note dated October 18, 2007 in which he found trigger digits of the left hand. On November 15, 2007 Dr. Lowe reported continued positive Tinel's signs and bilateral abductor pollicis weakness.

The Office noted that in his October 15, 2002 report Dr. Moore found no evidence of trigger digits. It concluded that this report conflicted with Dr. Lowe's October 18, 2007 note. The Office determined that a conflict of medical evidence existed and referred appellant to Dr. James E. Rice, a Board-certified orthopedic surgeon, to resolve the issue. Dr. Rice refused to perform the examination due to the size of the record. The Office then referred appellant to a Dr. William Andersen on May 21, 2008 due to a "conflict of medical evidence." The claims examiner stated that the physician's office determined that appellant's examination would be with a different doctor within the practice at an alternative location. On June 18, 2008 the Office referred appellant to Dr. Brian Szura, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Szura examined appellant on June 24, 2008 and reviewed the medical records. He noted that appellant reported triggering of the thumb, index and middle fingers of the left hand in the morning only and that she stated that she was required to manually extend these digits. On physical examination, Dr. Szura found no swelling in the upper arms and full range of motion. He diagnosed chronic bilateral hand and wrist pain and paresthesias of uncertain etiology and possible mild trigger fingers involving the thumb, index and middle fingers of the right hand. Dr. Szura found that appellant's trigger fingers were not related to her 1991 employment injury. He also did not recommend surgical treatment of this condition. Dr. Szura found that appellant had no other conditions directly related to her 1991 employment injury. He opined that appellant had no symptoms of sprain of the left hand, extensor tendinitis of the left elbow, or right carpal tunnel syndrome. Dr. Szura stated that appellant could work, but advised against highly repetitive activities with the hands and wrists.

In a letter dated December 3, 2008, the Office proposed to terminate appellant's compensation benefits based on Dr. Szura's report. Appellant responded on January 5, 2009 and stated that she had been unable to contact Dr. Lowe since September 2008. She stated that his office door was locked and that his telephone number had been disconnected.

By decision dated January 29, 2009, the Office terminated appellant's compensation and medical benefits effective February 15, 2009 relying on Dr. Szura's report.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.³ Its burden of proof in termination compensation includes the necessity of furnishing rationalized medical

² *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

³ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

opinion evidence based on a proper factual and medical background.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.⁵

The Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶ The implementing regulations states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁷

A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.⁸ The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the Physicians Directory System (PDS) should be used for this purpose wherever possible.⁹

ANALYSIS

Appellant's attending physician, Dr. Lowe, a Board-certified plastic surgeon, opined that she had developed the additional conditions of trigger fingers in her left hand which he believed were due to her accepted carpal tunnel syndrome and recommended corrective surgery. The district medical adviser disagreed and recommended a second opinion evaluation. The Office referred appellant to Dr. Moore, a Board-certified orthopedic surgeon. In his October 15, 2002 report, Dr. Moore found no evidence of trigger fingers and opined that even if present this condition would not be causally related to appellant's accepted employment injuries. He did not recommend additional surgery. The Office properly found a conflict of medical opinion

⁴ *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

⁵ *Mary A. Lowe*, *supra* note 3.

⁶ 5 U.S.C. §§ 8101-8193, 8123.

⁷ 20 C.F.R. § 10.321.

⁸ *B.P.*, 60 ECAB ____ (Docket No. 08-1457, issued February 2, 2009).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

evidence between appellant's attending physician, Dr. Lowe, and Dr. Moore, the Office referral physician, on the issue of whether appellant had developed trigger fingers, whether this condition was due to her employment and whether this condition required surgery, and referred appellant to Dr. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination. In his August 17, 2005 report, he opined that, if appellant had trigger fingers, then this condition was not due to her accepted employment injuries and that no surgery was necessary. With these statements, Dr. Elkins addressed the conflict before him regarding appellant trigger fingers.

Dr. Elkins further opined that on physical examination he found no evidence of synovitis, extensor tendinitis, or carpal tunnel syndrome, appellant's accepted employment injuries. He stated that no further treatment was necessary for these conditions and opined that appellant's work-related conditions had resolved as of August 17, 2005. As this opinion is beyond the scope of the original conflict, Dr. Elkins' opinion does not carry special weight on these issues.¹⁰ Appellant's attending physician, Dr. Lowe, continued to submit notes to the Office supporting appellant's continued disability and need for treatment due to her accepted carpal tunnel syndrome and other conditions. The Board finds that there developed a conflict of medical opinion evidence between Drs. Elkins and Lowe regarding whether appellant had any continuing disability or medical residuals as a result of her accepted employment injuries.

The Office attempted to resolve the conflict by referring appellant to Dr. Andersen, a Board-certified orthopedic surgeon, on May 21, 2008. However in a memorandum to the record, the claims examiner stated that Dr. Andersen's office determined that appellant's examination would be with a different doctor within the practice at an alternative location and requested that the Office refer appellant to Dr. Szura, a Board-certified orthopedic surgeon. On June 18, 2008 the Office referred appellant to Dr. Szura for an impartial medical examination.

The Board finds that this case is not in posture for decision due to an unresolved conflict of medical opinion evidence between Drs. Lowe and Elkins.

However, as Dr. Andersen's office requested that Dr. Szura perform the impartial medical examiner, Dr. Szura may not be considered an impartial medical specialist because he was not appointed by the Office to act as an impartial medical specialist in accordance with procedures for the selection of impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced¹¹ as set out above. Because Dr. Szura was not the impartial medical specialist selected by the Office in accordance with its rotating selection procedures, his opinion is not entitled to special weight. Although Dr. Szura is Dr. Andersen's associate, the Board notes that the record does not demonstrate that Dr. Szura would have been the next physician on the rotation list after Dr. Andersen. Therefore, to permit the use of Dr. Szura's medical opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial medical specialists.¹² As Dr. Szura cannot be considered to be

¹⁰ *Leanne E. Maynard*, 43 ECAB 482, 489-90 (1992).

¹¹ *Raymond J. Brown*, 52 ECAB 192, 194-96 (2001).

¹² *Id.*

an impartial medical specialist in this case, his report may not receive special weight and there remains an unresolved conflict in medical opinion. Therefore, the Office improperly terminated appellant's compensation benefits effective February 15, 2009.

CONCLUSION

The Board finds that as there is an unresolved conflict of medical opinion evidence, the Office failed to meet its burden of proof to terminate appellant's compensation and medical benefits.

ORDER

IT IS HEREBY ORDERED THAT January 29, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 30, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board